Supreme Court, U.S.
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93-990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY HELEN STOKES

Petitioner

v.

DR. KENNETH HATCH, ET. AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM

THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

ORAL ARGUMENT REQUESTED

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205 333-1999

32 PP

QUESTIONS PRESENTED

I. Whether Mary Helen Stoke's due process constitutional rights under the 5th and 14th Amendments to the U.S. Constitution were violated in all courts below when she had a meritorious malpractice case that almost costs her life due to a student doctor using substandard medical procedure at UAB Hospital in Birmingham, Alabama when she developed toxic shock syndrone that caused her to have permanent high blood pressure and pain in her muscles for a lifetime?

II. Whether the new procedural policy of the Supreme Court of Alabama to "Afirmed. no Opinion," policy is a state procedural policy infringing on the constitutional rights of a citizen of the United States to due process in the court especially since the trial court judge had abused his discretion in obeying prodecure in not allowing deposition to be taken according to Rule 56, Rules of Alabama Civil Procedure when

QUESTIONS PRESENTED (CONTINUED)

ruling on summary judgment which was granted in favor of defendants when clearly substandard medical procedure by allowing a student doctor to perform complicated surgery of endometriosis?

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PARTIES TO THE PROCEEDING

The petitioner is Mary Helen Stokes who was Plaintiff and Appellant below.

The respondents are Dr. Kenneth Hatch and Dr. Ronald Alvarez [student doctor at the time in UAB Hospital, Birmingham, Alabama] who were Defendants and Appellees below.

ORAL ARGUMENT REQUESTED

The Petitioner respectively requests that oral argument be allowed because of the complexity of the facts and the law in the instant case, and so that the Honorable Justices can ask questions.

No.

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OCTOBER TERM, 1993

MARY HELEN STOKES

Petitioner

v.

DR. KENNETH HATCH, ET AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM

THE SUPREME COURT OF ALABAMA

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OPINIONS BELOW

The Petitioner incorporates all statements which are stated in the Appendix as Opinions Below onto this Writ of Certiorari.

JURISDICTION

Reversal and review is sought from the final decision of the Supreme Court of Alabama, the highest court in state originally denied the appeal with the statement "affirmed. "No opinion". Jurisdiction invoked under 28 U.S.C. § 1254 as Writ.

Constitutional Provisions involved

Amendment XIV of Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law..."

Amendment XIV of the Constitution of the United States further provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."

Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall... be deprived of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

This is a malpractice case where the Defendants provided substandard medical care]Vol. I. p. 182, did not receive post-operative antibiotics] is an endometriosis operation which had to be performed a second time at the same site of the first operation because of failure of Defendants to administer peri-operative antibiotics to prevent development of Staphycoccus aureus, [Vol. V, p. 898, Staphycoccus aureus developed at site of first operation], and

the lack of this preventative antibiotics contributed to the second operation which had to be performed because of development of toxic shock syndrome from substandard surgery and the Defendant had to drain an infected hematoma at the site of the first operation [Vol. V, p. 877]. [Also, see Complaint Vol. I, p. 1-7, which was filed on June 11, 1991.]

On March 11, 1992, Defendant's attorney filed "Motion for Summary Judgment." [Vol. I, p. 138-151]. Exhibit B was only a denial by Dr. Hatch. Dr. Asam was not allowed to take the deposition of Dr. Hatch because the Honorable Judge of the trial court said Plaintiff could not take the deposition of Dr. Hatch at a hearing until ruling on summary judgment which is a violation of Rule 56, Rules of Civil Procedure.

No continuance was allowed which was filed on May 5, 1992 so that an expert witness could be found. [Vol. V, p. 826].

Motion for recusal was filed on May 7, 1992, but denied. [Vol. V, p.828-850].

Summary Judgment granted for Defendants [Vol. V, p. 912].

Motion to Alter, Amend and Vacate Judgment was denied August 12, 1992, and the appeal was timely filed on September 21, 1992.

The Supreme Court of Alabama ruled "Affirmed. No opinion", and overruled the Application for Rehearing on August 27, 1993.

STATEMENT OF THE FACTS

This is a complex malpractice case against Dr. Kenneth Hatch et al. Dr. Hatch was difficult to serve since he moved out of state after the malpractice incident. Dr. Kenneth Hatch was a staff doctor at the University of Alabama Hospitals in Birmingham, Alabama, at the time the Plaintiff, Mary Helen Stokes, received her operation for removal of endometriosis mass. [Vol. I, p. 148]. Dr. Hatch claimed in his affidavit that he assisted Dr. Alvarez [later added as defendant by Amendment, Vol. I, p. 154] when Dr. Alvarez was a student resident doctor - not yet licensed as a surgeon when Dr. Hatch was the

staff doctor. Mrs. Stokes paid for her medical treatment and was not told that Dr. Hatch would not actually completely perform the operation. [See Vol. I, p. 148, where Dr. Hatch stated, "I assisted Dr. Ronald Alvarez in the operation." It is said when a doctor denies any wrong doing [Affidavit Vol. I, p. 147-151] and denies he performed a second operation [Vol. I, p. 153], when an "infected hematoma" was sent to the pathology department, which means a specimen of tissue was removed from Mrs. Stokes in a second operation. See pathology report Vol. V, pp. 888-889 which clearly states on the top of the report "Surgical Pathology..." and "Exam of Tissue, Hematoma, left", and further states on Vol. V, p. 889. The findings are consistent with an abcess." Also, see Vol. V, p. 877, a letter from Dr. Kenneth D. Hatch, to Dr. Timothy Marlow in which Dr. Hatch speaks of "infected hematoma." There would be no "infected hematoma" at the site of the first operation which cuased the toxic shock syndrome in Mrs. Stokes, if the first operation had been

conducted with proper surgical management. [See Affidavit Vol. I, p. 149, that Mrs. Stokes was only given Tylox and Colace, and no mention of any post-operative antibiotics which would have prevented the toxic shock syndrome and febrile condition with sepsis that developed within 48 hours of the first operation and permanently damaged Mrs. Stokes who now has to take hypertension medicine [high blood pressure medicine' which she did not have to take before she developed toxic [Vol. V, p. 908] shock syndrome which almost cost her life when she had pulmonary and renal failure and she had to be transferred back to the UAB Hospital via helicopter, [Vol. V, p. 877].

The threshold issue in this instant case is not the merits of the case which the lower court never heard because of the abuse of due process rights of the Plaintiff to be heard in a court by several ways. [Violation 5th and 14th Amendments to U.S. Constitution due process rights of Plaintiff by trial court and now by

the highest appellate court, The Supreme Court of Alabama, ruling according to new policy "Affirmed. No opinion." which is another form of not providing due process in the appellate court.

In the trial court, first of all the Plaintiff's attorney was not allowed to take the deposition of Dr. Hatch until the summary judgment was to be ruled upon. [See Motion for Recusal, Vol. V, p. 828].

Second, the motion for Continuance was denied when an expert witness prospect may have been found. [Vol. V, p. 826].

Third, the Honorable lower court judge made reversible error by ruling that the Summary Judgment was granted for defendants [Vol. V, p. 909-912].

Fourth, the Motion to Alter, Amend... [Vol. V, p. 851] was judicial error because an expert witness had been found [see Vol. V, p. 857-908, "Amendment to Motion to Alter... and Notice of Filing Affidavit and Documents."]

It was difficult to find an expert witness at first because of the complex malpractice involving complications from child birth involving an endometriosis mass. If the Honorable Judge had allowed the deposition of Dr. Hatch to be taken according to Rule 56, Alabama Rules of Civil Procedure, when there is a Motion for Summary Judgment, it would have been known what type of expert or experts doctors would be necessary. Clearly, there were disputed facts as to whether substandard surgical procedure had been used in the first operation causing the second emergency operation whereby an infected hematoma was removed causing toxic shock syndrome which almost cost the life of the Plaintiff and left her with permanent damages to her both including lifetime pain in her muscles and high blood pressure which she did not have before the toxic shock syndrome.

REASONS FOR WRIT OF CERTIORARI

Questions I and II are discussed together since the bottom line is lack of due process in the trial court and the appellate court.

THE PLAINTIFF'S RIGHTS TO DUE PROCESS IN THE TRAIL COURT UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION WERE VIOLATED BY THE LOWER TRIAL COURT WHO RULED INCORRECTLY AND MADE REVERSIBLE ERROR ON ALL DISPOSITIVE MOTIONS AND ALWAYS RULED FOR THE DEFENDANT, AND IN THE APPELLATE COURT, THE SUPREME COURT OF ALABAMA, WERE VIOLATED WHEN THE APPELLATE COURT RULED "AFFIRMED. NO OPINION." NEW POLICY OF STATE PROCEDURE INFRINGING ON THE CONSTITUTIONAL RIGHTS OF A CITIZEN OF THE UNITED STATES TO DUE PROCESS IN THE APPELLATE COURT.

The threshold issue is clearly concerned whether the Plaintiff had due process rights under the 5th and 14th Amendments to the U.S. Constitution to have her case properly heard in the trial court court and appellant court. Both of

the issues listed are being discussed together since all relate to whether Plaintiff received the proper due process in any court as to her complex malpractice case. There is no doubt about it that the Plaintiff developed toxic shock syndrome v. sepsis as a direct result of the first operation of Dr. Hatch and Dr. Alvarez, failing to properly manage the PLaintiff's surgery since no peri-operative antibiotics were used and an "infected hematoma" developed within 48 hours causing toxic shock syndrome which caused both pulmonary and renal failure and caused permanent damage by causing hypertension [high blood pressure] to develop where the Plaintiff has to continue to take hypertensive drugs and pain pills because of pain in her muscles to live.

See Jones v. Alabama State Docks, 443 So. 2d 902 at 903, (Ala. 1983), which states,

"Due process clause of State Constitution secures every citizen against arbitrary action of those in authority and places him or her within protection of law of the land. Const. § 13."

See Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975) on due process.

The fact that the Honorable lower court judge did not recuse himself when the judge did not allow the Plaintiff's attorney to take the deposition of Dr. Hatch according to Rule 56, Alabama Rules of Civil Procedure, is clearly a violation of the plaintiff's right to due process under the 5th and 14th Amendments to the U. S. Constitution, and is an abuse of the discretion of the judge to recuse himself when he has made a gross procedural error in the court. Because of the complexity of this malpractice case, the obvious right thing to do he should have allowed plaintiff's attorney to take the deposition of Dr. Hatch, to determine what type of expert witness as a doctor would be necessary for this type of malpractice case in which Dr. Hatch had to perform a second operation to correct the error of causing an "infected hematoma" in the first operaiton due to surgical poor management by not providing post-operative antibiotics,

and by having the student resident doctor to perform the complex operation which should have been performed by the staff doctor completely by Dr. Hatch.

Clearly, the lower court judge should have continued the case for at least 14 days when a possible expert witness had been found who was an M.D. The point is whether the current expert witness rules found in the state law concerning medical malpractice are impinging on on the constitutional rights of due process in the courts as in this instant case when the trial judged abused his discretion by not continuing the case when he was to rule on summary judgment when there were clearly disputed facts. [See Code of Alabama, § 6-5-548 (a-c) imposed by the Medical Liability Act of 1987].

See Standard Oil Co. v. Graves, Wash. 1919, 49 S. Ct. 320, 249 U.S. 389, 63 L. Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violated the Federal constitution, the name given to the statute is not conclusive, and it must be judged by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void. Emphasis added.

See Horwitt v. Horwitt, D.C., Conn. 1950, 90 F. Supp. 529,

"United States Supreme Court may review directly the decision of the highest state courts on the constitutionality, under the Federal Constitution, of state statutes."

In this particular case it was not known from the beginning that Dr. Hatch assisted a resident doctor [student doctor in surgery] when Dr. Hatch was paid the full amount for his surgical services. Therefore, it is a question as to what type of expert witness was needed. The Plaintiff's attorney thoroughly researched this instant case in the medical library

in the UAB Medical Library because she has a Ph.D. in physiology, and because the judge would not allow her time by denying her Motion to Continue, she did state the facts showing the case had merits. There was doubt about it that there were disputed facts as to whether malpractice had been committed by Dr. Hatch and his student doctor Dr. Alvarez.

The trial court judge ignored the real expert witness Dr. Timothy Marlow who signed an affidavit [Vol. V, pp. 858-908] before the Honorable Judge ruled on the final motion in the court, and the judge made reversible error and the instant case should be reversed and remanded for jury trial for failure of the trial judge to follow the law in Alabama on Summary Judgment and failure of the Supreme Court of Alabama to rule according to their own law on summary judgment and going by a new policyof ruling in the Supreme Court of Alabama which consists of "Affirmed. No Opinion" so that nobody knows exactly why the case was not reversed and remanded.

The elements of summary judgment are found in the following Alabama two cases:

See Booth v. United Services Auto Association, 469 So. 2d 1281 (Ala. 1985), which states,

"To grant summary judgment, trial court must find that there is no genuine issue of material fact and that movant is entitled to judgment as matter of law. Rules Civ. Proc., Rule 56."

Also see Pruitt v. Elliott, 460 So. 2d 1275, (Ala. 1984), which states,

"Summary judgment is proper when there is no genuine issue of material fact and moving part is entitled to judgment as matter of law; all reasonable doubts concerning existence of genuine issue of fact must be resolved against moving party. Rules Civ. Proc. Rule 56 (c)."

Clearly, this instant case is challenging the current medical liability law cited above, p. 13 in Alabama about expert witness and in the instant case there is still what type of expert witness

was necessary since Dr. Hatch did not do what he was paid to do the surgery, but had his student, Dr. Alvarez, to perform the surgery, and Dr. Hatch assisted as Dr. Hatch claimed in his affidavit filed later in the case concerning summary judgment. As the expert witness law now stands a doctor can bury his mistakes and substandard medical care at the expense of justice to the victim patient. Therefore, the expert witness law in Alabama should be re-written as to not cause the constitutional rights of the patient [plaintiff] to be violated when there is a question of whether an expert witness law had been followed. Also when an expert witness had been found before 30 days after a ruling on summary judgment, the Honorable lower court judge made reversible error by not reversing his ruling on summary judgment and allowing the instant case to go to the jury. See again the case cited above, Standard Oil Co., v. Graves, supra, which states "if that is to violate the Constitution of the United States the law must be declared void."

In the instant case, expert witness law cited above concerning medical liability, when misinterpreted in the state highest court is not suppose to violate the due process rights of the Plaintiff under the 5th and 14th Amendment to the U.S. Constitution. However, with the new state policy in the Supreme Court of Alabama to rule "Affirmed. No Opinion," the instant case should be reversed and remanded for a jury trial of all triable issues, since no one knows what a court is doing when receive a notice of "No opinion." or whether the case was even heard by any justice.

See Hightower & Co. v. U.S. Fidelity & Guar., 527 So. 2d 698, at 699 (Ala. 1988), which states,

> "Granting Summary Judgment is nondiscretionary function of trial court, and no presumption of correctness attaches to such decision upon appellate review. Rules Civ. Proc., Rule 56 (c)."

See Clark v. Alabama Farm Bureau Mutual Casualty Insurance Co., 465 So. 2d 1135 (Ala. Civ. App. 1984, at 1136 which states,

"Party moving for summary judgment must show that under no discerniable set of circumstances could other party recover and that there is an absence of genuine issue as to any material fact. Rules Civ. Proc., Rule 56 (e)."

Mr. Norman, attorney for defendant, failed to show that "under no discernible set of circumstances could other party recover because there are clearly disputable facts. By Dr. Hatch in his affidavit just denying he did not act in a substandard way in the operation is not good enough when Dr. Hatch had a student resident doctor operating on Mrs. Stokes and the student doctor failed to use any peri-operational antibiotics which would have prevented the development of toxic shock syndrome in Mrs. Stokes. Mrs. Stokes was permanently damaged by Dr. Hatch only assisting and allowing the inexperience student doctor to operate when the operation was the removal of endometriotic mass.

The point is that the Honorable Judge blocked discovery in this instant case by not allowing the deposition of Dr. Hatch.

See Celotex Corporation v. Catrett, 477 U.S.__ 91 L. Ed 2d 265, 106 S Ct., 1986, which states,

> "In our view, the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial."Id.at 273.

This Writ of Certiorari should be granted and the petitioner allowed to write a Merits Brief so that the instant case can be reversed and remanded for a jury trial of all triable issues.

CONCLUSION

Clearly, the Plaintiff's due process rights under the 5th and 14th Amendments to the U.S. Constitution were violated when rules of discovery are ignored and the Defendant was unable to show any proof of any fact showing that a summary judgment should be granted, and the Plaintiff was not shown any due process in any court.

As a matter of law the instant case the Writ of Certiorari should be granted, and a Merits Brief allowed to be written and the instant case reversed and remanded for a jury trial of all triable issues.

Respectively submitted,

Julia Asam

11/26/93
Dated

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APPENDIX A

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALA.

MARY HELEN STOKES

Plaintiff

v. CV 91-4518

DR. KENNETH D. HATCH et al.

Defendant

ORDER

Defendant's Motion for Summary Judgment (having been previously continued at plaintiff's requests), [also continued at judge's requests since he was in hospital], came on to be heard this date. [Hon. Judge refused to continue on hearing for summary judgment when had opportunity to hire M.D.,J.D. as co-counsel and motion was before him]. Also considered by this Court are the plaintiff's Motion for Summary Judgment, plaintiff's Motion to Continue Summary Judgment Hearing, and Motion for Recusal. [because judge would not allow the deposition of Dr. Hatch to be taken before ruling on summary judgment].

This Court had reviewed all submitted materials prior to this hearing.

After almost one year from the date of filing of the Complaint, plaintiff seeks a continuance so as to attempt to obtain expert testimony to support her Complaint and to oppose Summary Judgment. [Had a M.D.,J.D. who wished to associate with the case and not allowed by judge, and this M.D.,J.D. was to obtain an expert]. [this M.D.,J.D. was not found until almost time for the summary judgment hearing but the Hon. Judge would not allow continuance].

It is noteworthy that plaintiff's counsel, under a slightly different name, has executed affidavit proof, [research from the medical library at UAB Hospital, Birmingham by Ph.D. in physiological oncological research since Julia Asam is a Ph.D., J.D. was submitted showing the merits until an M.D. expert could be found which was found before the hearing a M.D.,J.D., who was not allowed to associate since he needed two

weeks because of his schedule to study the case and come into the case] in her posture as a medical liability expert. Having read the affidavit of plaintiff counsel/expert, it is noteworthy that articles authored by plaintiff counsel/expert, are some 30 years of age, [in the field of oncological research and one book was written in 1976 - the years were not important since counsel later studied law after her cancer laboratory was stolen] and that the speciality or credentials of plaintiff counsel/expert are ostensibly in a specialty rather distinct from that of the defendant (obstetrics-surgery). [who was also in oncological surgery since endometriosis mass was removed from Plaintiff and there was a question as to what type of expert was to be used, and the Hon. Judge did not allow deposition of Dr. Hatch which was requested by Notice of Deposition on March 12, 1992 at which time exactly what type of expert could have been determined and was the

reason for Motion for Recusal and the Hon. Judge refused to get off the case].

May 8, 1992.

s/ W.J. Wynn, Circuit Judge

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALA.

MARY HELEN STOKES

Plaintiff

v. CV 91-4518

DR. KENNETH D. HATCH

Defendant

ORDER

Plaintiff's Amendment to Motion to Alter... and Notice of Filing Affidavit and Documents came on to be heard on August 5, 1992. After review of documents submitted by plaintiff and consideration of oral arguments and brief, this Court finds not a scintilla of evidence law or issues of fact which would allow it to grant plantiff's motion. Wherefore, motion

Denied. [the medical record indicated that there was a second operation and the plaintiff almost died of toxic shock syndrome which was ignored by the court]. This Court's Order of 5-8-92 remains intact.

August 12, 1992.

s/ W.J. Wynn

Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

Case no. 1911969

Mary Helen Stokes

Appellant

v.

Dr. Kenneth Hatch et al.

Appellees

Appeal from Circuit Court of Jefferson County, Alabama CV 91-4518

Affirmed. No Opinion. February 26, 1993.

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

Case no. 1911969

Mary Helen Stokes

Appellant

v.

Dr. Kenneth Hatch et al.

Appellees

Application for rehearing overruled. No opinion written on rehearing.

August 27, 1993.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this Writ... was sent to Mr. Robert Norman, Attorney At Law, 1800 City Federal Bldg., Birmingham, Alabama 35203 this 26 day of November 1993.

Julia Asam

Supreme Court, U.S.
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No. 93-990

IN THE

Supreme Court Of The United States

October Term, 1993

MARY HELEN STOKES,

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v.

DR. KENNETH HATCH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In reality, no legitimate question is presented by Plaintiff in her Petition for Writ of Certiorari. Since Plaintiff seeks review of a final judgment of the Supreme Court of Alabama by the Supreme Court of the United States, it would have to arise under 28 U.S.C.S. § 1257. In this case, under § 1257, a Writ of Certiorari is authorized only where a statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treatises or laws of the United States. Since no statute of the United States is questioned, it follows that Plaintiff must be questioning the validity of a State statute as being repugnant to the Constitution, treatises or laws of the United States. However, since no Alabama statute is cited, there is no legitimate question presented.

Respondent Dr. Kenneth Hatch can only present the proposition that the Supreme Court of Alabama correctly affirmed the order of the Alabama Circuit Court dismissing this cause of action.

The first question presented in the Petition asks the Court to rule or speculate on facts which are all rabid delusions of the attorney for Petitioner. No evidence or testimony on the merits was ever received. There are no facts to be considered.

The second question presented by Petitioner is no better than the first in that it again refers to totally inaccurate procedural and factual delusions of the attorney for Petitioner and seems to ask whether a Rule of Appellate Procedure of the Supreme Court of Alabama of affirming the order of a Circuit Court of Alabama without an opinion violates the constitutional rights of due process of a citizen of the United States. While Petitioner does not identify or set out the Appellate Rule which she questions, Rule 53, Alabama Rules of Appellate Procedure, does provide for affirmance of a trial court without an opinion if the court determines: (1) That an opinion in the case would serve no significant precedential purpose; and (2) That one of six designated circumstances exists. (See Appendix p. 1-a). Petitioner has not set

out the complete ruling of the Supreme Court of Alabama in her appendix since she failed to show in her appendix that the affirmance without opinion by the Supreme Court of Alabama is based on Rule 53(a)(1) and (a)(2)(F) Alabama Rules of Appellate Procedure (see Appendix p. 2-a for full copy of the ruling of the Supreme Court of Alabama). In compliance with Rule 53(b) the Supreme Court of Alabama designated that no opinion was called for due to the fact that an opinion would serve no precedential purpose (Rule 53(a)(1)) and that the judgment or order was entered without an error of law (Rule 53(a)(2)(F)).

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Rules of Court:

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Rule 53 (a) and (b), Alabama Rules of Appellate Procedure ..... i, ii, 5, 6, 1-a to 2-a

JURISDICTION

Again, Plaintiff is intentionally and knowingly incorrect in asserting that Dr. Ronald Alvarez was a respondent. This is simply false. The only respondent was Dr. Kenneth Hatch.

Plaintiff invokes jurisdiction "under 28 U.S.C. § 1954 as Writ". There is no such section in 28 U.S.C. Petitioner cites Amendment V and XIV of the Constitution of the United States but fails to allege how these Amendments invoke the jurisdiction of this Court.

STATEMENT OF THE CASE

The recitation of facts as presented by Petitioner is outrageously inaccurate and wholly false. The representation that the trial judge of the Alabama Circuit Court prevented "Dr. Asam" from taking the deposition of Dr. Hatch is knowingly false and patently irresponsible. There are no facts on the merits that have ever been before any court in this case. Petitioner's attorney, Mrs. Asam, has established a modus operandi in all her cases of walking into the Clerk's office and filing large volumes of medical records on the assumption that she can then argue the merits of her case regardless of any legal issues or procedural requirements.

The true statement of this case is that the Complaint filed by Plaintiff purports to allege a medical malpractice case against Defendant, Dr. Kenneth D. Hatch, who is Board Certified in Obstetrics and Gynecology. While the allegations of the Complaint are difficult to decipher, the charge seems to be that Dr. Hatch failed to prevent infection from occurring in the operation site of Plaintiff after a surgical procedure for excision of a left paravaginal/paravulvar nodule. As part of this charge, Dr. Hatch is alleged to have performed this surgery in a manner which was below the standard of care which caused Plaintiff to become infected.

Unfortunately, a statement of the case demands a rather extended presentation in order to make the sequence of events understandable. The course of the proceedings was

that after suit was filed on June 11, 1991 (R. Vol. I, pg. 1), and after interrogatories were answered by Plaintiff on October 24, 1991, (R. Vol. I, pg. 15), and after an Amended Complaint was filed on November 12, 1991, (R. Vol. I, pg. 128), there was a status docket set before the trial judge on February 10, 1992, (R. Vol. V, pg. 909) which counsel for Plaintiff failed to attend. At this hearing, the trial judge set the case for trial on September 14, 1992 (R. Vol. V, pg. 910). Thereafter with Defendant urging the identity of plaintiff's expert in order to get ready for trial, plaintiff did not amend her Answers to Interrogatories to identify the expert to be called at the time of trial and to provide information as to the opinion of the expert as to breach of any standard of care by Dr. Hatch. On March 11, 1992, Defendant filed a Motion for Summary Judgment (R. Vol. I, pg. 138) based on the amended complaint and a full and explicit Affidavit from Dr. Hatch, licensed and certified by the American Board of Obstetrics and Gynecology, setting out his activity in the surgical procedure and alleging that everything done in the procedure was within the standard of care. This Motion for Summary Judgment was originally set for hearing before the trial judge on March 24, 1992, at 8:30 a.m., but this setting was changed by a letter from the trial judge due to a personal medical problem (R. Vol. V, pg. 856), and on March 12, 1992, the trial judge entered an order that the Motion for Summary Judgment was "irrevocably" set for hearing on April 6, 1992, at 9:00 a.m. (R. Vol. V, pg. 910). While the trial judge said the hearing was irrevocable, at the request of Plaintiff's counsel, the hearing was again postponed until May 8, 1992.

Before the hearing of the Defendant's Motion for Summary Judgment, Plaintiff filed a Motion for Summary Judgment and a "Motion Objecting to Motion for Summary Judgment" on April 2, 1992 (R. Vol. I, pg. 155, 157). In the latter motion, Plaintiff's counsel, Julia McCain Lampkin Asam, Ph.D., J.D., offered herself, Dr. Julia Lampkin-Asam, Ph.D., as her own expert witness for Plaintiff! Mrs. Asam was not a medical doctor, much less certified in Obstetrics and Gyne-

cology. As a Ph.D. in Physiology, Dr. Lampkin-Asam did research in Lister Hill Medical Library in Birmingham and said that Dr. Hatch's Affidavit was insufficient because it was not substantiated by an independent expert! Defendant filed motions to strike Dr. Lampkin-Asam's Affidavit (R. Vol. V, pg. 815) and responding to Plaintiff's "Objection to Motion for Summary Judgment" (R. Vol. V, pg. 823)

No interrogatories to Dr. Hatch have ever been filed by Plaintiff. A Request for Admission was filed by Plaintiff on February 11, 1992, (R. Vol. I, pg. 136) and a Response was timely filed by Defendant on March 12, 1992 (R. Vol. I, pg. 152).

On May 5, 1992, Plaintiff filed a Motion for Continuance of the hearing on the Defendant's Motion for Summary Judgment because "fortunately, Julia Asam, has recently met Dr. Carl R. Robinson, and his son, Carl Wade Robinson, who is also a lawyer" and more time was needed for medical record review and evaluation- (R. Vol. V, pg. 826). Dr. Robinson never did materialize as an expert witness in this case!

On May 8, 1992, the trial court considered all pleadings filed and heard Mrs. Asam's argument. Again, reminding Mrs. Asam of the court's prior admonitions to Mrs. Asam that she had to have testimony or an affidavit of a competent and qualified medical expert to counter the allegations of Dr. Hatch that all his actions were within the standard of care, the trial court ruled her offerings insufficient and denied the Plaintiff's various motions (R. Vol. V, pg. 911-912). At that time, the court granted Defendant's Motion for Summary Judgment and entered a final judgment in favor of defendant (R. Vol. V, pg. 912).

On June 4, 1992, Plaintiff filed a Motion to Alter, Amend and Vacate Judgment (R. Vol. V, pg. 851) based on identical pleadings and argument presented on May 8, 1992. Then, on August 5, 1992, Plaintiff filed an amendment to her Motion to Alter (R. Vol. V, pg. 857) in which she included an Affidavit of a Dr. Timothy Marlow which stated only that Dr. Marlow was a specialist in Obstetrics and Gynecology and attended Plaintiff from June 25 to June 28, 1989 (R. Vol. V, pg.

859)! There is nothing in the affidavit to refute Dr. Hatch's Affidavit that all his care and treatment of Plaintiff was within the standard of care!

On August 5, 1992, the court considered all these motions and heard arguments and on August 12, 1992, ruled that said motions were denied, and "This Court's Order of 5-8-92 remains intact." (R. Vol. V, pg. 912).

Notice of Appeal to the Supreme Court was filed on September 21, 1992 (R. Vol V, pg. 913).

SUMMARY OF THE ARGUMENT

Petitioner filed suit on June 11, 1991, and on February 10, 1992, the trial judge set the case for trial on September 14, 1992. Petitioner did not identify her expert witness or provide any discovery as to what her expert would testify to as a breach of any standard of care by Defendant, Dr. Hatch. On March 11, 1992, Dr. Hatch filed a Motion for Summary Judgment with an Affidavit attached setting out his entire involvement in the surgical procedure and alleging that everything done by him was within the standard of care. After extended hearings and admonitions of Petitioner attorney by the trial judge, Petitioner continued to fail to produce an expert witness to counter the Affidavit of Dr. Hatch in support of his motion for summary judgment. Finally on May 8, 1992, the trial court granted summary judgment and entered a final judgment in favor of Defendant. After various post judgment motions of Petitioner were heard, the trial court denied all motions on August 12, 1992.

No. 93-990

IN THE

Supreme Court Of The United States

October Term, 1993

MARY HELEN STOKES,

Petitioner,

v.

DR. KENNETH HATCH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Dr. Kenneth Hatch, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Mary Helen Stokes.

REASONS FOR DENYING THE PETITION

1. Petitioner has failed to present questions that require this Court to issue a Writ of Certiorari.

2. The questions presented by Petitioner demonstrate fictitious, frivolous and unsubstantiated issues which lack all color of merit and have no substance or foundation. Petitioner has attempted to perpetuate a fraud on this Court by failing to honestly and completely present Rule 53, Alabama Rules of Appellate Procedure, and by failing to honestly and completely present the ruling of the Supreme Court of Ala-

bama under said Rule 53, as based upon Rule 53(a)(1) and (a)(2)(F).

3. Under Rule 10, Rules of the Supreme Court of the United States, there is no special or important reason set out for granting this Petition for a Writ of Certiorari.

4. The trial court's ruling on Summary Judgment and dismissal of the case, and affirmance by the Supreme Court of Alabama were correct.

CONCLUSION

This Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January 11, 1994

APPENDIX

APPENDIX

RULE 53. OPINIONS AND "NO OPINION" CASES OF THE SUPREME COURT AND THE COURT OF CIVIL APPEALS

(a) Affirmance Without Opinion. The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:

(1) That an opinion in the case would serve no significant precedential purpose; and

(2) That one of the following circumstances exists:

(A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

(B) The evidence adequately supports the jury verdict on which the judgment or order is based;

(C) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;

(D) The order of an administrative agency is sufficiently supported by the evidence in the record;

(E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict; and that judgment is supported by the record; or

(F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

(b) Designation of Category. When the Supreme Court or the Court of Civil Appeals affirms a judgment without an opinion, it shall in its order of af-

firmance designate the case as a "No Opinion" case and in its order of affirmance it shall also cite section (a) (1) of this rule and that subpart of section (a) (2) relied upon by the court in its decision to write no opinion.

STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 1992-93

1911969

Mary Helen Stokes v. Dr. Kenneth Hatch, Appeal from Jefferson Circuit Court (CV-91-4518)

ADAMS, JUSTICE.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Hornsby, C. J., and Almon, Steagall, and Ingram, JJ., concur.

No. 93-990

Supreme Court, U.S.
FILED
JAN 24 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY HELEN STOKES

Petitioner

v.

KENNETH HATCH, ET AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM

THE SUPREME COURT OF ALABAMA

MOTION OBJECTING TO **FALSE STATEMENTS IN** "BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI" AND RESPONSE AND **AMENDMENT** TO "PETITION FOR WRIT OF CERTIORARI"

JULIA ASAM

ATTORNEY AT LAW

P.O. BOX 591

NORTHPORT, ALABAMA 35476

205 333-1999

QUESTIONS PRESENTED

I. Whether Mary Helen Stoke's due process constitutional rights under the 5th and 14th Amendments to the U.S. Constitution were violated in all courts below when she had a meritorious malpractice case that almost costs her life due to a student doctor using substandard medical procedure at UAB Hospital in Birmingham, Alabama when she developed toxic shock syndrone that caused her to have permanent high blood pressure and pain in her muscles for a lifetime?

II. Whether the new procedural policy of the Supreme Court of Alabama to "Afirmed. no Opinion," [Rule 53(a)(1) and (a)(2)(F), Ala.R.App.P.] policy is a state procedural policy infringing on the constitutional rights of a citizen of the United States to due process in the court especially since the trial court judge had abused his discretion in obeying prodecure in not allowing deposition to be taken according to Rule 56, Rules of Alabama Civil Procedure when ruling on summary judgment which was granted

in favor of defendants when clearly substandard medical procedure by allowing a student doctor, R. Alvarez, to perform complicated surgery of endometriosis [Vol. I, p. 148, Affidavit p. 2, which stated, "I assisted Dr. Ronald Alvarez in the excision..." signed by Kenneth D. Hatch, M.D. on p. 5 of his Affidavit [Vol. I, p. 148, i.e. Alabama state procedural rule 53 is repugnant to the U.S. Constitutional rights of due process under the 5th and 14th amendments to the U.S. Constitution.

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PARTIES TO THE PROCEEDING

The petitioner is Mary Helen Stokes who was Plaintiff and Appellant below.

The respondents are Dr. Kenneth Hatch and Dr. Ronald Alvarez [student doctor at the time in UAB Hospital, Birmingham, Alabama] who were Defendants and Appellees below.

ORAL ARGUMENT REQUESTED

The Petitioner respectively requests that oral argument be allowed because of the complexity of the facts and the law in the instant case, and so that the Honorable Justices can ask questions.

MOTION OBJECTING TO FALSE STATEMENTS IN "BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI" AND RESPONSE

As to the Questions presented by Petitioner, she has corrected the typographical error from 28 U.S.C.S § 1254 to 28 U.S.C.S. § 1257.

The Petitioner states that statements made in Questions 1 and 2 are true and correct, and has added the Rule 53 since reference was made to the "state procedural policy", [see Questions Presented #2 this Amendment...].

As to the purposely deleting respondent Alvarez by the attorney, Mr. Norman, he completely is ignoring an "Amendment to Amended Complaint" below which states, "1. Every time Dr. Hatch is mentioned in the Amended Complaint is now to read Dr. Hatch and Dr. R. Alvarez, since Dr. Hatch in his affidavit admitted he assisted Dr. Alverez."; the student doctor was Alvarez, and this document was dated May 7, 1992. [see Vol. I, p. 148, in affidavit of Dr. Hatch that "I assisted Dr. Ronald Alvarez in the excision..." signed by Kenneth D. Hatch, M.D. on p. 5 of his Affidavit [Vol.I,p.151].

Mr. Norman made the <u>false</u> statement "The recitation of facts as presented by Petitioner is outrageously

inaccurate and wholly false." The second sentence by Mr. Norman is also false because the Judge was asked to recuse himself for the very reason of not allowing the deposition of Dr. Hatch [See Notice of Taking Deposition, which reprinted in the Appendix, and also see "Motion for Recusal" which was filed, May 7, 1992, which stated reason for recusal was, "1. Deposition was not allowed of Dr. Hatch before Summary Judgment hearing." which was denied Vol. V, 828-850].

Please note the second reason for Recusal was because the Judge did not allow continuance because newly fould M.D.,J.D., needed time to evaluate the case, and the judge ruled on the summary judgment before Dr. Robinson could make an appearance in the case. Note that the ruling originally made on May 8, 1992, when trial was not set until September 1992, and an continuance of two weeks would not have prejudiced the defendants. [Vol. V p. 912]. [See cop of"Motion for Recusal" reprinted in the Appendix.

It is noted in the Summary of the Argument on p. 4 of the Respondent's brief that no citations of law were presented in his brief.

The Petitioner adopts the Reasons for Granting Petition and as amended in this brief by Petitioner, and states that the questions presented do require that the Honorable Court issue a Writ of Certiorari [See the Questions presented this Brief pp. i-ii.]

The Respondent's attorney has again made false statements in his #2 p. 5 comments personally attacking the Petitioner's attorney because the instant case whereby an attorney representing the insurance company Mr. Norman can completely ignore the substandard technique of Dr. Hatch allowing the student Dr. Alvarez to perform such a complicated operation as an endometriosis operation when no peri-operative antibiotics were administered and severe infection developed, if the Judge had recused himself or allowed only two weeks more of continuance an expert witness would have been obtained in the instant case. However, the Petitioner's due process rights in the court below were clearly violated when the Judge did not allow the deposition to be taken of Dr. Hatch which had been scheduled for almost two months [See reprint of "Notice of

taking Deposition" in appendix, and #1 reason listed for "Motion for Recusal". The point is this is a case whereby the Judge should have recused himself when he did not allow the deposition of Dr. Hatch, [See reprinted "Motion for Recusal"]. Also see the case, Lijebert v. Health Serv. Acquisition Corp. 108 S Ct 2194, 2204 (1988), which held that some judicial orders must be vacated on appeal upon finding the trial judge issued an erroneous recusal decision, and in the instant case this erroneous recusal decision violated the due process of the Petitioner to have her case heard in a court of law with impartiality.

No. 93-990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY HELEN STOKES

Petitioner

v.

KENNETH HATCH, ET AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM THE SUPREME COURT OF ALABAMA

"PETITION FOR WRIT OF CERTIORARI"

OPINIONS BELOW

The Petitioner incorporates all statements which are stated in the Appendix as Opinions Below onto this Writ of Certiorari.

JURISDICTION

Reversal and review is sought from the final decision of the Supreme Court of Alabama, the highest court in state originally denied the appeal with the statement "affirmed. "No opinion". Jurisdiction invoked under 28 U.S.C.S. § 1257 as Writ.

Constitutional Provisions involved

Amendment XIV of Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law..."

Amendment XIV of the Constitution of the United States further provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."

Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall... be deprived of life, liberty or property, without due process of law;"

See rule 53, Alabama Rules of Appellate Procedure reprinted in Appendix.

STATEMENT OF THE CASE

This is a malpractice case where the Defendants provided substandard medical care [Vol. I. p. 182, did not receive post-operative antibiotics] is an endometriosis operation which had to be performed a second time at the same site of the first operation because of failure of Defendants to administer peri-operative antibiotics to prevent development of Staphycoccus aureus, [Vol. V, p. 898, Staphycoccus aureus developed at site of first operation], and

the lack of this preventative antibiotics contributed to the second operation which had to be performed because of development of toxic shock syndrome from substandard surgery and the Defendant had to drain an infected hematoma at the site of the first operation [Vol. V, p. 877]. [Also, see Complaint Vol. I, p. 1-7, which was filed on June 11, 1991.]

On March 11, 1992, Defendant's attorney filed "Motion for Summary Judgment." [Vol. I, p. 138-151]. Exhibit B was only a denial by Dr. Hatch. Dr. Asam was not allowed to take the deposition ~~of~~ Dr. Hatch because the Honorable Judge of the trial court said Plaintiff could not take the deposition of Dr. Hatch at a hearing until ruling on summary judgment which is a violation of Rule 56, Rules of Civil Procedure.

No continuance was allowed which was filed on May 5, 1992 so that an expert witness could be found. [Vol. V, p. 826].

Motion for recusal was filed on May 7, 1992, but denied. [Vol. V, p.828-850].

Summary Judgment granted for Defendants [Vol. V, p. 912].

Motion to Alter, Amend and Vacate Judgment was denied August 12, 1992, and the appeal was timely filed on September 21, 1992.

The Supreme Court of Alabama ruled "Affirmed. No opinion", and overruled the Application for Rehearing on August 27, 1993.

STATEMENT OF THE FACTS

This is a complex malpractice case against Dr. Kenneth Hatch et al. Dr. Hatch was difficult to serve since he moved out of state after the malpractice incident. Dr. Kenneth Hatch was a staff doctor at the University of Alabama Hospitals in Birmingham, Alabama, at the time the Plaintiff, Mary Helen Stokes, received her operation for removal of endometriosis mass. [Vol. I, p. 148]. Dr. Hatch claimed in his affidavit that he assisted Dr. Alvarez [later added as defendant by Amendment, Vol. I, p. 154] when Dr. Alvarez was a student resident doctor - not yet licensed as a surgeon when Dr. Hatch was the

staff doctor. Mrs. Stokes paid for her medical treatment and was not told that Dr. Hatch would not actually completely perform the operation. [See Vol. I, p. 148, where Dr. Hatch stated, "I assisted Dr. Ronald Alvarez in the operation." It is said when a doctor denies any wrong doing [Affidavit Vol. I, p. 147-151] and denies he performed a second operation [Vol. I, p. 153], when an "infected hematoma" was sent to the pathology department, which means a specimen of tissue was removed from Mrs. Stokes in a second operation. See pathology report Vol. V, pp. 888-889 which clearly states on the top of the report "Surgical Pathology..." and "Exam of Tissue, Hematoma, left", and further states on Vol. V, p. 889. The findings are consistent with an abcess." Also, see Vol. V, p. 877, a letter from Dr. Kenneth D. Hatch, to Dr. Timothy Marlow in which Dr. Hatch speaks of "infected hematoma." There would be no "infected hematoma" at the site of the first operation which caused the toxic shock syndrome in Mrs. Stokes, if the first operation had been

conducted with proper surgical management. [See Affidavit Vol. I, p. 149, that Mrs. Stokes was only given Tylox and Colace, and no mention of any post-operative antibiotics which would have prevented the toxic shock syndrome and febrile condition with sepsis that developed within 48 hours of the first operation and permanently damaged Mrs. Stokes who now has to take hypertension medicine [high blood pressure medicine' which she did not have to take before she developed toxic [Vol. V, p. 908] shock syndrome which almost cost her life when she had pulmonary and renal failure and she had to be transferred back to the UAB Hospital via helicopter, [Vol. V, p. 877].

The threshold issue in this instant case is not the merits of the case which the lower court never heard because of the abuse of due process rights of the Plaintiff to be heard in a court by several ways. [Violation 5th and 14th Amendments to U.S. Constitution due process rights of Plaintiff by trial court and now by

the highest appellate court, The Supreme Court of Alabama, ruling according to new policy "Affirmed. No opinion." which is another form of not providing due process in the appellate court. See rule 53, Alabama Rules of Appellate Procedure reprinted in Appendix, and Question presented #2.

In the trial court, first of all the Plaintiff's attorney was not allowed to take the deposition of Dr. Hatch until the summary judgment was to be ruled upon. [See Motion for Recusal, Vol. V, p. 828]. [Also see Appendix].

Second, the motion for Continuance was denied when an expert witness prospect may have been found. [Vol. V, p. 826].

Third, the Honorable lower court judge made reversible error by ruling that the Summary Judgment was granted for defendants [Vol. V, p. 909-912].

Fourth, the Motion to Alter, Amend... [Vol. V, p. 851] was judicial error because an expert witness had been found [see Vol. V, p. 857-908, "Amendment to Motion to Alter... and Notice of Filing Affidavit and Documents."]

It was difficult to find an expert witness at first because of the complex malpractice involving complications from child birth involving an endometriosis mass. If the Honorable Judge had allowed the deposition of Dr. Hatch to be taken according to Rule 56, Alabama Rules of Civil Procedure, when there is a Motion for Summary Judgment, it would have been known what type of expert or experts doctors would be necessary. Clearly, there were disputed facts as to whether substandard surgical procedure had been used in the first operation causing the second emergency operation whereby an infected hematoma was removed causing toxic shock syndrome which almost cost the life of the Plaintiff and left her with permanent damages to her both including lifetime pain in her muscles and high blood pressure which she did not have before the toxic shock syndrome.

REASONS FOR WRIT OF CERTIORARI

Questions I and II are discussed together since the bottom line is lack of due process in the trial court and the appellate court.

THE PLAINTIFF'S RIGHTS TO DUE PROCESS IN THE TRAIL COURT UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION WERE VIOLATED BY THE LOWER TRIAL COURT WHO RULED INCORRECTLY AND MADE REVERSIBLE ERROR ON ALL DISPOSITIVE MOTIONS AND ALWAYS RULED FOR THE DEFENDANT, AND IN THE APPELLATE COURT, THE SUPREME COURT OF ALABAMA, WERE VIOLATED WHEN THE APPELLATE COURT RULED "AFFIRMED. NO OPINION." NEW POLICY OF STATE PROCEDURE INFRINGING ON THE CONSTITUTIONAL RIGHTS OF A CITIZEN OF THE UNITED STATES TO DUE PROCESS IN THE APPELLATE COURT. See Rule 53 in Appendix.

The threshold issue is clearly concerned whether the Plaintiff had due process rights under the 5th and 14th Amendments to the U.S. Constitution to have her case properly heard in the trial court court and appellant court. Both of

the issues listed are being discussed together since all relate to whether Plaintiff received the proper due process in any court as to her complex malpractice case. There is no doubt about it that the Plaintiff developed toxic shock syndrome v. sepsis as a direct result of the first operation of Dr. Hatch and Dr. Alvarez, failing to properly manage the PLaintiff's surgery since no peri-operative antibiotics were used and an "infected hematoma" developed within 48 hours causing toxic shock syndrome which caused both pulmonary and renal failure and caused permanent damage by causing hypertension [high blood pressure] to develop where the Plaintiff has to continue to take hypertensive drugs and pain pills because of pain in her muscles to live.

See Jones v. Alabama State Docks, 443 So. 2d 902 at 903, (Ala. 1983), which states,

"Due process clause of State Constitution secures every citizen against arbitrary action of those in authority and places him or her within protection of law of the land. Const. § 13."

See Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975) on due process.

The fact that the Honorable lower court judge did not recuse himself when the judge did not allow the Plaintiff's attorney to take the deposition of Dr. Hatch according to Rule 56, Alabama Rules of Civil Procedure, is clearly a violation of the plaintiff's right to due process under the 5th and 14th Amendments to the U. S. Constitution, and is an abuse of the discretion of the judge to recuse himself when he has made a gross procedural error in the court. Because of the complexity of this malpractice case, the obvious right thing to do he should have allowed plaintiff's attorney to take the deposition of Dr. Hatch, to determine what type of expert witness as a doctor would be necessary for this type of malpractice case in which Dr. Hatch had to perform a second operation to correct the error of causing an "infected hematoma" in the first operaiton due to surgical poor management by not providing post-operative antibiotics,

and by having the student resident doctor to perform the complex operation which should have been performed by the staff doctor completely by Dr. Hatch. [See Lijebert v. Health Serv. Acquisition Corp. 108 S Ct 2194, 2204 (1988), which held that some judicial orders must be vacated on appeal upon finding the trial judge issued an erroneous recusal decision.

Clearly, the lower court judge should have continued the case for at least 14 days when a possible expert witness had been found who was an M.D. The point is whether the current expert witness rules found in the state law concerning medical malpractice are impinging on on the constitutional rights of due process in the courts as in this instant case when the trial judged abused his discretion by not continuing the case when he was to rule on summary judgment when there were clearly disputed facts. [See Code of Alabama, § 6-5-548 (a-c) imposed by the Medical Liability Act of 1987].

See Standard Oil Co. v. Graves, Wash. 1919, 49 S. Ct. 320, 249 U.S. 389, 63 L. Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violated the Federal constitution, the name given to the statute is not conclusive, and it must be judged by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void. Emphasis added.

See Horwitt v. Horwitt, D.C., Conn. 1950, 90 F. Supp. 529,

"United States Supreme Court may review directly the decision of the highest state courts on the constitutionality, under the Federal Constitution, of state statutes."

In this particular case it was not known from the beginning that Dr. Hatch assisted a resident doctor [student doctor in surgery] when Dr. Hatch was paid the full amount for his surgical services. Therefore, it is a question as to what type of expert witness was needed. The Plaintiff's attorney thoroughly researched this instant case in the medical library

in the UAB Medical Library because she has a Ph.D. in physiology, and because the judge would not allow her time by denying her Motion to Continue, she did state the facts showing the case had merits. There was doubt about it that there were disputed facts as to whether malpractice had been committed by Dr. Hatch and his student doctor Dr. Alvarez.

The trial court judge ignored the real expert witness Dr. Timothy Marlow who signed an affidavit [Vol. V, pp. 858-908] before the Honorable Judge ruled on the final motion in the court, and the judge made reversible error and the instant case should be reversed and remanded for jury trial for failure of the trial judge to follow the law in Alabama on Summary Judgment and failure of the Supreme Court of Alabama to rule according to their own law on summary judgment and going by a new policyof ruling in the Supreme Court of Alabama which consists of "Affirmed. No Opinion" so that nobody knows exactly why the case was not reversed and remanded [See Rule 53, Alabama Rules of Appellate Procedure.

The elements of summary judgment are found in the following Alabama two cases:

See Booth v. United Services Auto Association, 469 So. 2d 1281 (Ala. 1985), which states,

"To grant summary judgment, trial court must find that there is no genuine issue of material fact and that movant is entitled to judgment as matter of law. Rules Civ. Proc., Rule 56."

Also see Pruitt v. Elliott, 460 So. 2d 1275, (Ala. 1984), which states,

"Summary judgment is proper when there is no genuine issue of material fact and moving part is entitled to judgment as matter of law; all reasonable doubts concerning existence of genuine issue of fact must be resolved against moving party. Rules Civ. Proc. Rule 56 (c)."

Clearly, this instant case is challenging the current medical liability law cited above, p. 13 in Alabama about expert witness and in the instant case there is still what type of expert witness

was necessary since Dr. Hatch did not do what he was paid to do the surgery, but had his student, Dr. Alvarez, to perform the surgery, and Dr. Hatch assisted as Dr. Hatch claimed in his affidavit filed later in the case concerning summary judgment. As the expert witness law now stands a doctor can bury his mistakes and substandard medical care at the expense of justice to the victim patient. Therefore, the expert witness law in Alabama should be re-written as to not cause the constitutional rights of the patient [plaintiff] to be violated when there is a question of whether an expert witness law had been followed. Also when an expert witness had been found before 30 days after a ruling on summary judgment, the Honorable lower court judge made reversible error by not reversing his ruling on summary judgment and allowing the instant case to go to the jury. See again the case cited above, Standard Oil Co., v. Graves, supra, which states "if that is to violate the Constitution of the United States the law must be declared void."

In the instant case, expert witness law cited above concerning medical liability, when misinterpreted in the state highest court is not suppose to violate the due process rights of the Plaintiff under the 5th and 14th Amendment to the U.S. Constitution. However, with the new state policy in the Supreme Court of Alabama to rule "Affirmed. No Opinion," the instant case should be reversed and remanded for a jury trial of all triable issues, since no one knows what a court is doing when receive a notice of "No opinion." or whether the case was even heard by any justice.

See Hightower & Co. v. U.S. Fidelity & Guar., 527 So. 2d 698, at 699 (Ala. 1988), which states,

> "Granting Summary Judgment is nondiscretionary function of trial court, and no presumption of correctness attaches to such decision upon appellate review. Rules Civ. Proc., Rule 56 (c)."

See Clark v. Alabama Farm Bureau Mutual Casualty Insurance Co., 465 So. 2d 1135 (Ala. Civ. App. 1984, at 1136 which states,

"Party moving for summary judgment must show that under no discerniable set of circumstances could other party recover and that there is an absence of genuine issue as to any material fact. Rules Civ. Proc., Rule 56 (e)."

Mr. Norman, attorney for defendant, failed to show that "under no discernible set of circumstances could other party recover because there are clearly disputable facts. By Dr. Hatch in his affidavit just denying he did not act in a substandard way in the operation is not good enough when Dr. Hatch had a student resident doctor operating on Mrs. Stokes and the student doctor failed to use any peri-operational antibiotics which would have prevented the development of toxic shock syndrome in Mrs. Stokes. Mrs. Stokes was permanently damaged by Dr. Hatch only assisting and allowing the inexperience student doctor to operate when the operation was the removal of endometriotic mass.

The point is that the Honorable Judge blocked discovery in this instant case by not allowing the deposition of Dr. Hatch.

See Celotex Corporation v. Catrett, 477 U.S.__ 91 L. Ed 2d 265, 106 S Ct., 1986, which states,

"In our view, the plain language of Rule 56 (mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial."Id.at 273

This Writ of Certiorari should be granted and the petitioner allowed to write a Merits Brief so that the instant case can be reversed and remanded for a jury trial of all triable issues.

BEST AVAILA

CONCLUSION

Clearly, the Plaintiff's due process rights under the 5th and 14th Amendments to the U.S. Constitution were violated when rules of discovery are ignored and the Defendant was unable to show any proof of any fact showing that a summary judgment should be granted, and the Plaintiff was not shown any due process in any Court. The Rule 53 of the Alabama Rules of Appellat Procedure, especially rule 53 (a)(1) and (a)(2)(F), [See appendix p. a-xi] is repugnant to the U.S. Constitutional rights of Petitioner in that no due process was shown in the Court when Affirmed. No opinion, and a violaiton of due process is a violation of the Petitioner's constitutional rights under the 5th and 14th amendments to the U.S. Constitution.

As a matter of law the instant case the Writ of Certiorari should be granted, and a Merits Brief

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allowed to be written and the instant case reversed and remanded for a jury trial of all triable issues.

Respectively submitted,

Julia Asam

1/24/94
dated

JULIA ASAM
ATTORNEY AT LAW
P.O. BOX 591
NORTHPORT, ALABAMA 35476
205 333-1999

APPENDIX A

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALA.

MARY HELEN STOKES

Plaintiff

v. CV 91-4518

DR. KENNETH D. HATCH et al.

Defendant

ORDER

Defendant's Motion for Summary Judgment (having been previously continued at plaintiff's requests), [also continued at judge's requests since he was in hospital], came on to be heard this date. [Hon. Judge refused to continue on hearing for summary judgment when had opportunity to hire M.D.,J.D. as co-counsel and motion was before him]. Also considered by this Court are the plaintiff's Motion for Summary Judgment, plaintiff's Motion to Continue Summary Judgment Hearing, and Motion for Recusal. [because judge would not allow the deposition of Dr. Hatch to be taken before ruling on summary judgment].

This Court had reviewed all submitted materials prior to this hearing.

After almost one year from the date of filing of the Complaint, plaintiff seeks a continuance so as to attempt to obtain expert testimony to support her Complaint and to oppose Summary Judgment. [Had a M.D.,J.D. who wished to associate with the case and not allowed by judge, and this M.D.,J.D. was to obtain an expert]. [this M.D.,J.D. was not found until almost time for the summary judgment hearing but the Hon. Judge would not allow continuance].

It is noteworthy that plaintiff's counsel, under a slightly different name, has executed affidavit proof, [research from the medical library at UAB Hospital, Birmingham by Ph.D. in physiological oncological research since Julia Asam is a Ph.D., J.D. was submitted showing the merits until an M.D. expert could be found which was found before the hearing a M.D.,J.D., who was not allowed to associate since he needed two

weeks because of his schedule to study the case and come into the case] in her posture as a medical liability expert. Having read the affidavit of plaintiff counsel/expert, it is noteworthy that articles authored by plaintiff counsel/expert, are some 30 years of age, [in the field of oncological research and one book was written in 1976 - the years were not important since counsel later studied law after her cancer laboratory was stolen] and that the speciality or credentials of plaintiff counsel/expert are ostensibly in a specialty rather distinct from that of the defendant (obstetrics-surgery). [who was also in oncological surgery since endometriosis mass was removed from Plaintiff and there was a question as to what type of expert was to be used, and the Hon. Judge did not allow deposition of Dr. Hatch which was requested by Notice of Deposition on March 12, 1992 at which time exactly what type of expert could have been determined and was the

reason for Motion for Recusal and the Hon. Judge refused to get off the case].

May 8, 1992.

s/ W.J. Wynn, Circuit Judge

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALA.

MARY HELEN STOKES

Plaintiff

v. CV 91-4518

DR. KENNETH D. HATCH

Defendant

ORDER

Plaintiff's Amendment to Motion to Alter... and Notice of Filing Affidavit and Documents came on to be heard on August 5, 1992. After review of documents submitted by plaintiff and consideration of oral arguments and brief, this Court finds not a scintilla of evidence law or issues of fact which would allow it to grant plantiff's motion. Wherefore, motion

Denied. [the medical record indicated that there was a second operation and the plaintiff almost died of toxic shock syndrome which was ignored by the court]. This Court's Order of 5-8-92 remains intact.

August 12, 1992.

s/ W.J. Wynn

Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

Case no. 1911969

Mary Helen Stokes

Appellant

v.

Dr. Kenneth Hatch et al.

Appellees

Appeal from Circuit Court of Jefferson County, Alabama CV 91-4518

Affirmed. No Opinion.

See Rule 53(a)(1) and (a)(2)(F), Ala.R.App.P.

February 26, 1993.

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

Case no. 1911969

Mary Helen Stokes

Appellant

v.

Dr. Kenneth Hatch et al.

Appellees

Application for rehearing overruled. No opinion written on rehearing.

August 27, 1993.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY

ALABAMA

MARY HELEN STOKES

PLAINTIFF

V. CV 91-4518

DR. KENNETH HATCH

DEFENDANT

NOTICE OF TAKING DEPOSITION

Comes now the Plaintiff, Mary Helen Stokes, through her undersigned attorney, Julia McCain Lampkin Asam, Ph.D.,J.D., and files this Notice of Taking deposition

To: Mr. Robert Norman
Norman, Fitzpatrick et al.
1800 City Federal Bldg.
Birmingham, Alabama 35203

that Dr. Kenneth Hatch is to be available at 9:00 A.M. on May 4, 1992, for the taking of his deposition at the Southern Court Reporters' conference room in Birmingham, Alabama, and that his deposition will be taken before court reporter under oath until completed pursuant to the Rule

26, Alabama Rules of Civil Procedure and other discovery rules.

Respectively submitted,

s/Julia Asam

Julia Asam, Attorney At Law
P.O. Box 591
Suite 10, North View Plaza
3120 McFarland Blvd.
Northport, Alabama 35476

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above was sent to Mr. R. Norman, Norman, Fitzpatrick et al., by hand-delivery at hearing on March 12, 1992, on this the 12th day of March 1992.

s/ Julia Asam

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,

ALABANA

MARY HELEN STOKES

PLAINTIFF

V. CV 91-4518

DR. KENNETH HATCH, ET AL.

DEFENDANT

MOTION FOR RECUSAL

Comes now the plaintiff, Mary Helen Stokes, through her undersigned attorney, Julia McCain Lampkin Asam, Ph.D., J.D., and files this "Motion for Recusal" for the following reasons:

1. Deposition was not allowed of Dr. Hatch before Summary Judgment Hearing.

2. Continuance was not allowed when M.D.,J.D., was found recently and seen on May 5, 1992, at which time he agreed to review and evaluate the instant case and a gynocologist expert would be found. Dr. Carol R. Robinson is also an expert witness. Any new lawyer on a case should have sufficient time to review the case.

3. The summary judgment hearing of May 7, 1992, should have been continued since the trial is not scheduled any time soon. See Byrd v. Leach,

226 So. 2d 866, 1969, which held,

"Burden of proving abasnce of material facts so that no genuine issue is left for jury determination is on movant for summary judgment, and if evidence by affidavits, deposition or otherwise demonstrates the existence of a genuine issue summary judgment should be denied."

4. By scheduling hearing for summary judgment at 4:50 P.M. is not enough time to argue a summary judgment.

Respectively submitted,

s/ Julia Asam

Julia Asam, Attorney At Law
P.O. Box 591
Suite 10, North View Plaza
3120 McFarland Blvd.
Northport, Ala. 35476
333-1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above was sent to Mr. Robert Norman, 1800 City Federal Bldg., Birmingham,Ala. 35203, this 7 day of May 1992.

s/Julia Asam

RULE 53. OPINIONS AND "No OPINION"
CASES OF THE SUPREME COURT
AND THE COURT OF CIVIL APPEALS

(a) Affirmance Without Opinion. The Supreme Court of the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if court determines.

(1) That an opinion in the case would serve no significant precedential purpose; and

(2) That one of the following circumstances exists:

(A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous.

(B) The evidence adequately supports the jury verdict on which the judgment or order is based;

(C) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings of that would have been necessary to support the judgment or order;

(D) The order of an administrative agency is sufficiently supported by the evidence in the record;

(E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and judgment is supported by the record; or

(F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this Writ... was sent to Mr. Robert Norman, Attorney At Law, 1500 Liberty National Building, 2001 Third Avenue South, Birmingham, Alabama 35233-2101 this 24 day of January 1994.

Julia Asam